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No. 98-0117

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

In re HAL TAYLOR,
Debtor.

STEPHEN W. RUPP, TRUSTEE,
Petitioner,
v.
JULIA TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should accept Certiorari on the premise that the determination of equitable property interests is a question of fact, when the United States Court of Appeals for the Tenth Circuit and the United States Bankruptcy Court determined that it is a conclusion of law.

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RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS

Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

STATUTES

11 U.S.C. § 541(a)(1) provides as follows:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Section 30-2-1, Utah Code Annotated, provides as follows:

> Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and

remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Section 30-2-3, Utah Code Annotated, provides as follows:

A conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons.

Section 30-2-5, Utah Code Annotated, provides as follows:

(1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:

(a) contracted or incurred before marriage;

(b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;

(c) contracted or incurred after divorce or an order for separate maintenance under this title, except that the spouse is personally liable for that portion of the expenses incurred on behalf of a minor child for reasonable and necessary medical and dental expenses, and other similar necessities as provided in a court order under Section 30-3-5, 30-4-3, or 78-45-7.15, or under an administrative order under Section 62A-11-326; or

(d) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.

(2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

Section 75-2-201, Utah Code Annotated, provides in pertinent part as follows:

(1) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate multiplied by a fraction, the numerator of which is the value of the decedent's marital property as defined in Subsection 75-2-202(2) and the denominator of which is the sum of:

(a) the value of the estate undiminished by funeral and administration expenses, homestead, family allowances, and exemptions or enforceable claims; and

(b) the amounts referred to in Subsections 75-2-202(1)(a) and (b) under the limitations and conditions provided for in this part.

. . . .

(3) Any determination concerning title to, or the validity of a document concerning, real property in this state, including without limitation a determination of the value of the consideration received by the decedent or a determination of

whether any subsequent grantee was a bona fide purchaser, shall be governed by Title 57.

Section 75-2-202(1)(a), Utah Code Annotated, provides in pertinent part as follows:

(1) The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts: -

(a) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during the most recent marriage to the surviving spouse, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

. . . .

(iv) Any transfer to a donee made within two years of the death of the decedent to the extent that the aggregate transfers to that donee in either of the years exceed $3,000.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. . . .

Section 75-2-204, Utah Code Annotated, provides as follows:

> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after the marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 75-2-401, Utah Code Annotated, provides as follows:

> A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of $10,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to $10,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over, all claims against the estate, except claims for reasonable funeral expenses and expenses of administration.

The homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by intestate succession, but is chargeable against any share passing by the will of decedent, unless the will provides otherwise.

Section 78-23-4, Utah Code Annotated, provides in pertinent part as follows:

(4) If an individual is married, no conveyance of or security interest in, or contract to convey or create a security interest in property recorded as a homestead prior to the time of such conveyance, security interest, or contract shall be valid, unless both the husband and wife join in the execution of the conveyance, security interest, or contract.

STATEMENT

Introduction

The primary issue herein is whether the trustee should be able to take a home from Julia Taylor ("Judy"), who has resided therein for twenty-five years, and has held title to the home solely in her name for ten (10) years before this action was commenced. The Tenth Circuit Court of Appeals correctly determined that the law prohibits this taking of property.

The trustee attempts to obtain this Court's review by misstating his central issue, i.e. he asserts that the Tenth Circuit erred by reversing a finding of fact made by the Bankruptcy Court. This alleged finding was the determination of whether Hal Taylor ("Hal") had an equitable interest in

property titled in Judy's name. Yet, even the lower court determined this issue to be a conclusion of law, not a finding of fact. (App. 52a-53a). The trustee has not identified a finding that was reversed. The Tenth Circuit decided that the Bankruptcy Court reached incorrect conclusions by wrongly applying the law. (App. 13a, 15a).

Background

In November, 1973, Hal and Judy, husband and wife, purchased a home. (App. 26a[1]). The Taylors acquired the home in joint tenancy. It had an original mortgage amount of $56,000.00. (App. 26a).

In 1982, Hal suffered a massive coronary. Hal's brother had died of a heart attack and his widow had to sell their home due to problems with the estate (Tr.P.103L4-13). Concerned about his own health, Hal wanted to insure that in the event of his death, Judy and their minor son, Cody, would be protected. (Tr.P.53L3). (App. 26a-27a).

In May 1985, Hal gifted to Judy his 1/2 undivided interest in the home. The gift was accomplished by recordation of a Warranty Deed, which conveyed Hal's interest in the property to Judy. (App. 27a). Hal was a real estate broker and knew the significance of a transfer by Warranty Deed. (App. 22a, 25a).

Hal testified that conveyed the property for estate planning and because his family had a history of heart disease. (App. 27a).

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[1] References herein to "App." are references to Petitioner's Appendix.

At the time of the transfer, Hal was a defendant, however, he satisfied the judgment without delay. (App. 27a).

Hal was not insolvent at the time of the transfer. (App. 27a, 41a). The transfer was not made with actual intent to hinder, delay, or defraud creditors. (App. 41a). The transfer was not a fraudulent conveyance. (App. 37a-42a, 45a-46a).

In 1985, Judy used $25,000 from her personal inheritance to pay off the mortgage on the home (Tr.P.52L25). (App. 27a, 41a).

In 1986, Hal was elected Mayor and served until 1989. (App. 5, 23a). During his term, Hal's real estate business became inactive and his income declined. His monthly net income as mayor was $600.00. (App. 23a). In 1989, Hal suffered a stroke which left him crippled and unable to work. (App. 5, 24a). In 1992, Hal began receiving Social Security. (App. 26a).

In 1992, Hal had to file a Chapter 7 Bankruptcy. (App. 30a). After he filed, Hal learned that three lots, on which he had believed the bank had foreclosed, were not in the bank's security. Consequently, the lots had not been listed as property of the debtor. The lots were offered to the original trustee, Harriet Styler, as ability to pay in full the one creditor.

The lots have been sold and the trustee holds $37,500.00. The debtor obtained the buyers for the three lots. The trustee has obtained additional property of the estate.

There is one creditor with a claim of less than $30,000.00. (App. 5, 29a, 30a).

The trustee and his counsel have filed fee applications exceeding $250,000.00. Yet, the three lots were sold and sufficient proceeds were received to fully satisfy the creditor. (¶ ¶ 9-16, Affidavit of trustee filed in Response to Motion for Emergency Stay, which was filed by Judy with the Tenth Circuit Court of Appeals.)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE ULTIMATE DETERMINATION OF WHETHER HAL HAD AN EQUITABLE INTEREST IN PROPERTY IS A CONCLUSION OF LAW

The trustee's assertion that the Court below abused its authority when it decided that resolution of ownership of equitable property interests is a conclusion of law does not warrant review by this Court. The trustee recognizes that he cannot succeed unless he can persuade this Court that this issue is a question of fact. Yet, the Court of Appeals, and the Bankruptcy Court, found it to be a conclusion of law. The Tenth Circuit did not reverse a finding of fact made by the Bankruptcy Court.

The findings are in the Appendix provided by the trustee on pages 22a through 37a. They include the normal demonstrations of fact, things that can be seen, touched, smelled, heard; that are events or happenings. See Black's Law Dictionary, p. 591 (6th ed. 1990). The findings do not contain a statement by the Bankruptcy Court that Hal retained an equitable interest in Judy's home. This determination is stated in the Conclusions of Law.

II. THE TENTH CIRCUIT CORRECTLY HELD THAT THE BANKRUPTCY COURT WRONGFULLY IMPOSED A RESULTING TRUST BY INCORRECTLY APPLYING THE LAW

The decision of the Bankruptcy Court is against the overwhelming legal authority applicable to this case and the Tenth Circuit reversed the determination on that basis. The Court of Appeals noted that

> A bankruptcy estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case.' 11 U.S.C. § 541(a)(a). The existence and extent of such an interest is determined by state law, in this case the law of Utah. See e.g. United States v. Rodgers, 461 U.S. 677, 683, 690-91 (1983).

The law in Utah is clear. Utah was the first state in the nation to grant a woman the Constitutional right to own property. Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

(Emphasis added.) Also, the Utah Legislature enacted § 30-2-1, Utah Code Annotated, which duplicates the Constitutional provision contained in Article XXII, § 2, Utah Constitution. The Legislature strengthened the rights of women to own their own property by adding protections to those rights. Section 30-2-3, Utah Code Annotated, provides that "a conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." (Emphasis added). Finally, the Legislature stated that

> (1) Neither spouse is personally liable for the separate debts, obligations, or liabilities of the other:
>
> (b) contracted or incurred during marriage, except family expenses as provided in Section 30-2-9;
>
> (c) ordered by the court to be paid by the other spouse under Section 30-3-5 or 30-4-3 and not in conflict with Section 15-4-6.5 or 15-4-6.7.
>
> (2) The wages, earnings, property, rents, or other income of one spouse may not be reached by a creditor of the other spouse to satisfy a debt, obligation, or liability of the other spouse, as described under Subsection (1).

(Emphasis added).

Accordingly, Utah law is clear on a woman's right to own property without it being subject to claims of her husband's creditors, notwithstanding that she acquired it from her husband during marriage. The

only limitation is to claims of creditor's that are based on family or household purposes. In the present case, Judy held the property in her name and was listed as the owner on the deed and the tax records. The evidence proved that Judy provided a major portion of the household income after the transfer of the property into her name. The claim in the bankruptcy case of Hal Taylor is not for family or household purposes. Certainly, the creditor had no legitimate expectation that Judy's property would be available for debts owed by Hal.

The lower court held that Hal owned an equitable interest in this property based upon its determination that facts supported the imposition of a "resulting and/or constructive trust". To impose a resulting trust, the movant must prove that a trust was intended. In re Taylor, 133 F.3d 1336, 1341 (10th Cir. 1998). Generally, if one party purchases property and titles it in another party's name, it is presumed that a trust was intended. Id. An exception to this general rule applies, however, when the parties are married. Section 442 of the Restatement (Second) of Trusts, states:

> Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property.

To impose a resulting trust, the trustee was required to prove, by clear and convincing evidence, that Hal intended to retain an interest at the time he made the transfer. In re Taylor, 133 F.3d at 1341 (quoting Chambers v. Emery, 13 Utah 374, 45 Pac. 192, 195 (1896) and Restatement (Second) of Trusts § 443 comment a).

The Tenth Circuit noted that the Bankruptcy Court found Hal to be "a real estate broker who 'understands real estate transactions'" and that the Taylors "'testified that they transferred legal title because of estate planning and inheritance tax concerns after [Harold's] heart attack.'" In re Taylor, 133 F.3d at 1341. Yet, the Bankruptcy Court used subsequent conduct to infer that Hal never intended to convey all of his property.

Accordingly, the Tenth Circuit ruled:

> there is no basis for the bankruptcy judge's determination that the facts rebut the presumption that when a husband pays (or here, signs over his interest) for property that is placed in his wife's name, he intends a gift. In fact, Harold's act of conveying his interest was more deliberate because he and Julia already held title to their home jointly. The Taylors' explanation -- that Harold had seen his brother's widow experience difficulty selling a home that had been co-owned, that he had heart trouble and wanted to ensure Julia would have the home if he died -- while perhaps not a

model of legal reasoning must have been discounted for the judge to have reached her conclusion.

> The Bankruptcy Judge appears to have adopted a per se rule that when a husband conveys to his wife his interest in the home but intends to continue to reside there and help pay real estate taxes, insurance, and other household bills that accrue, he intends to continue to hold a fifty percent beneficial interest in the property.

In re Taylor, 133 F.3d at 1341-42. Such a per se rule adopted by the lower court directly contravenes the law stated by § 442 of the Restatement (Second) of Trusts, and as applied in Utah cases. See Parks v. Zions First National Bank, 673 P.2d 590 (Utah 1983). It violates Article XXII, § 2, Utah Constitution, as well as § § 30-2-1, et seq., Utah Code Annotated. It fails to follow the law requiring determination of intent at the time of the transfer.

Finally, the Tenth Circuit held that, "[a]s a practical matter such a rule would prevent transfers of title to the home between spouses to accomplish such objectives as avoiding probate and arranging the two estates to take advantage of the estate and inheritance tax laws exemptions." In re Taylor, 133 F.3d at 1342 (citing 26 U.S.C § § 2001(c), 2010(a) as examples). Like in the case of Parks v. Zions First National Bank, 673 P.2d 590 (Utah 1983), the Bankruptcy Court should have rejected the request to impose a resulting trust.

In Pate v. U.S. Dept. of Treasury I.R.S., 949 F.2d 1059 (10th Cir. 1991), the Tenth Circuit held that "[w]hen a husband purchased property for his wife, not only is the resulting trust presumption inapplicable, but the wife is entitled to the opposing presumption that the property is hers alone by way of a gift or advancement." Id. at 1061. Further, "[t]he presumption against a resulting trust arising out of the 1975 acquisition controls unless rebutted by clear and convincing evidence, Fletcher [v. Fletcher], 244 P.2d 827, 830 (Okl. 1952); King [v. Courtney], 122 P.2d 1014, 1015 (Okl. 1952)." Id. See also Utah cases: Furniture Mfrs. Sales, Inc. v. Deamer, 680 P.2d 398, 399 (Utah 1984); Meyer v. General Amer. Corp., 569 P.2d 1094, 1096 (Utah 1977); Territorial Sav. & Loan Ass'n v. Baird, 781 P.2d 452 (Utah App. 1989).

In Pate, 949 F.2d 1059, Whit Pate provided the sole family income and mortgaged the home in which he and his wife lived. He, however, transferred ownership to his wife by putting the deed in her name. Subsequently, the Court determined that Whit Pate did not own any interest in the property despite that he paid the mortgage, he took out other loans on the property and repaid them, his income was the sole family income and he continued to live in the home. Similarly, Pate, like Hal, transferred the home to his wife and a wife is allowed to receive property by gift and hold it as her own. That property is not subject to claims of her husband's creditors, including the claim of the IRS.

After the decision in Pate, the wife and children sought to obtain their costs of

litigation from the I.R.S. on the grounds that the litigation was without merit. On appeal, the Court of Appeals determined that the government had pursued a position that was not substantially justified and determined that if the wife and children satisfied the net worth requirements they would be awarded their litigation costs. Pate v. U.S., 982 F.2d 457 (10th Cir. 1993). "The government's position was not 'substantially justified' because although Mr. Pate was an unsavory character who had undisputed liabilities and no significant assets, under well settled Oklahoma law he did not have a property interest in the house." As in Utah, in Oklahoma there is a general presumption in favor of a resulting trust. Pate, 949 F.2d at 1060. Nevertheless, "'there is a well-established exception . . . [that] [w]hen a husband purchased his property for his wife, not only is the resulting trust presumption inapplicable, but the wife is entitled to the opposing presumption that the property is hers alone by way of gift or advancement." Id. at 1060-61. The government's position was unreasonable because the gift presumption was "triggered by" the very circumstances present in this case, id. at 1061, and there were no facts to rebut the gift presumption. Like the current case, the gift occurred prior to any liability of Mr. Pate.

III. THE TENTH CIRCUIT CORRECTLY HELD THAT THE LOWER COURT INCORRECTLY IMPOSED A CONSTRUCTIVE TRUST BECAUSE IT APPLIED THE WRONG LAW

The Tenth Circuit analyzed the imposition of a constructive trust by the Bankruptcy Court.

> "'A constructive trust is imposed not because of the intention of the parties but because the person holding title to property would profit by a wrong or would be unjustly enriched if [s]he were permitted to keep the property. A constructive trust, unlike an express or resulting trust is remedial in character.'"

In re Taylor, 133 F.3d at 1342 (quoting Restatement (Second) of Trusts at 326. Black's Law Dictionary, p. 1535, states the doctrine of unjust enrichment as follows:

> General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated.

Although the facts that can support imposition of a constructive trust are unlimited, those circumstances must be shown by clear and convincing evidence. In re Taylor, 133 F.3d at 1342; Nielson v. Rasmussen, 558 P.2d 511, 513 (Utah 1976). The situation must be considered from Hal's position, not his creditor's, "to determine whether it would be a wrong to Harold to let Julia keep the property." Id. "The bankruptcy judge already had found Harold transferred the property while he was solvent and not in anticipation of litigation." Id. There is no wrong to Hal or unjust enrichment to Judy. A constructive trust should not have been imposed.

The Tenth Circuit noted that the Bankruptcy Court heavily relied upon the case of Parks, 673 P.2d 590, to impose a constructive trust. This case, however, "is quite distinguishable from the case before us." In re Taylor, 133 F.3d at 1342. The factual situation in Parks and the facts of this case are extremely different. In Parks, Mrs. Parks was the bookkeeper and handled all paper work for the family. When property was acquired, she titled it in her name. This is a very important distinction. Mr. Parks never owned record interest in the property. He never took any action to gift the property to his wife. Mrs. Parks, therefore, was not entitled to the Constitutional or statutory protections involving her property received by gift. Mr. Parks was never able to exercise his right to retain an interest in the property.

In this case, Hal could have retained his interest, or at the time of his transfer, he could have retained some interest, such as a life estate, but he voluntarily chose not to do so, thereby demonstrating his donative intent to give his property to Judy.

Obviously, Hal intended that Judy own the beneficial interest in the property. In Parks, to impose a constructive trust and overcome the presumption of § 442 of the Restatement (Second) of Trusts, it was necessary to implement the application of § 160, Restatement of Restitution. Section 160 requires proof that the title holder was unjustly enriched by retention of the title.

The Tenth Circuit found the use of § 160 in Parks to be

> imminently reasonable. The court there prevented an injustice by applying equitable remedies where no trust intent existed. In contrast, in the case before us the supposed equitable owner is the one who made the gift, and he manifested no intent that his wife not have the legal and equitable title to the home. The fact that he paid real estate taxes, insurance and utility bills could certainly be seen as his contributing to the expenses in return for living in the home which she owned. Indeed, a Utah statute imposes on both husband and wife "'the expenses of the family' Utah Code Ann. § 30-2-9; many of these payments would surely fall into that category.

In re Taylor, 133 F.3d at 1342-43. The Court of Appeals held that the Bankruptcy Court applied Parks too broadly,

> adopting a per se rule that would effectively nullify any attempt by one spouse to transfer all right, title and interest in a home in which he or she continues to reside, at least if the grantor continues to pay any costs of the occupancy. We believe that is not the law of Utah.

Id. at 1343 (emphasis added). Consequently, the Tenth Circuit held that the lower court erred in its application of law and reversed

the determination that Hal had an equitable one-half interest. Id. at 1343. The Court of Appeals decision is consistent with, and applies, Utah law. Review is illogical.

IV. THE "TRANSCRIPT ISSUE" IS SUBTERFUGE; THE TRUSTEE SHOULD NOT BE ABLE TO USE THE ARGUMENT IN HIS ATTEMPTS TO PERSUADE THIS COURT TO REVIEW THIS CASE

a) The Tenth Circuit did not reverse any findings of fact made by the Bankruptcy Court. The Appellate Court accepted the lower court's findings, but reversed the application of law to those facts. This is the prerogative of the Appellate Court. Accordingly, whether the transcript was received by the Court of Appeals is not relevant to this Court's determination of whether to grant Certiorari in this case.

b) In addition, the transcript of the trial was designated as part of the record. The initial appeal of the Bankruptcy Court's decision was heard by the United States District Court for the District of Utah. The docket demonstrating the record that was transferred from the Bankruptcy Court to the District Court includes the following items:

> 06/12/95 -- Transcript of Hearing Held on 05/25/95 Transcript ID: 737 (closing Arguments) (hph) [EOD 09/08/95]
>
> 08/28/95 -- Transcript of Hearing Held on 5/25/95 Transcript IDL 739 (hph) [09/08/98]
>
> 08/30/95 -- Transcript of Hearing Held on 5/25/95 Transcript ID: 738 (hph) [09/08/95]

When the appeal was filed with the Tenth Circuit, the entire record from the District Court was designated. The Transcript Order Form was marked as follows:

> I HAVE NOT ORDERED A TRANSCRIPT BECAUSE
>
> . . . .
>
> [X] The necessary transcript is already on file in District Court.

Judy is unaware of any reason precluding transfer of the transcript.

Finally, each party cited to the transcript to support the facts in their briefs. The Appellate Court stated that it did not have the transcript, In re Taylor, 133 F.3d at 1340-41, however, the Court accepted the facts found by the lower court and those undisputed by the parties. The issue of the transcript is a mystery, however, it is irrelevant. The Appellate Court's reversal of the lower court's decision was based on the lower courts' rulings on, and applications of, the law.

III. THE COURT OF APPEALS DID NOT INTRODUCE OR FIND NEW FACTS

The trustee inappropriately asserts that the Tenth Circuit "introduced and found facts not at issue and concerning which no evidence was ever presented."

a) The trustee asserts that "matters of estate and inheritance tax planning . . . were never the subject of nor issues in this case or appeal." Brief, p. 10. Clearly, estate planning was at issue when the "Taylors testified the conveyance was made for estate planning purposes". (App. 27a).

Further, this issue has been argued in every brief since the initial appeal. The trustee's assertion is disingenuous at best.

b) The trustee asserts that the Court of Appeals made a finding of fact that "any financial institution loaning money on the security of a home would require a consent or guarantee by a spouse of the title holder because of the spousal elective share and homestead exemptions law." Brief, pp. 10-11. Yet, this statement simply recognizes Utah law, which has been asserted by Judy from the trial and throughout the appeal.

The Tenth Circuit Court noted that, in Utah, upon the death of one spouse, the other spouse has a right to elect a spousal share of the estate. The right does not arise until death, however, the law requires that any waiver or subrogation of the right in writing and signed by the spouse. See § § 75-2-201, 75-2-202, 75-2-401, Utah Code Ann. Accordingly, the Tenth Circuit noted that if a mortgage holder wanted to retain priority interest over a surviving spouse, the bank likely would require the signature of both spouses, even though one spouse does not own the property. This is a natural conclusion from the law and is not a finding of fact.

Also, the Appellate Court noted that a resident in a home can claim a homestead exemption, even if not an owner, which exemption cannot be waived without a written document. See § § 78-23-3, 78-23-4, Utah Code Ann. Again, an inherent assumption is that a bank would require signatures of both spouses, even though one spouse does not own the property. This is a natural conclusion from the law and is not a finding of fact.

c) The Trustee asserts that the Tenth Circuit disregarded the "finding" of the Bankruptcy Court that the property was marital property. First, whether property is marital is a question of law. Thus, if the Appellate Court did "disregard" this "finding" it was entitled to do so. Second, the determination of what is marital property in Utah is made on a case by case basis, but generally does not include property received by gift or inheritance. The trustee failed to cite one case supporting his assertion that Judy's home would be found to be marital property. The two cases cited by the trustee, Hoagland v. Hoagland, 852 P.2d 1025 (Utah App. 1993) and Hogue v. Hogue, 831 P.2d 120 (Utah App. 1992), are not applicable to the facts in this case. In Hoagland and Hogue, the divorce court found the property to be marital property because it had been transferred to wives to avoid husbands' creditors. Thus, facts existed to avoid the transfers based upon fraudulent conveyance theories and resulting trust theories. In this case, the lower court ruled against the trustee on the fraudulent conveyance theories. The Appellate Court ruled against the trustee on the trust theories because the lower court had improperly applied the law. The Appellate Court did not disregard a "finding" of the lower court.

d) The trustee erroneously asserts that the Appellate Court "ignored findings that constituted 'badges' of ownership." Brief, p. 13. In fact, the Tenth Circuit acknowledged these findings of fact made by the Bankruptcy Court. The Court of Appeals, however, applied the correct law to the facts and reached a different conclusion. The trustee really is arguing that the Tenth

Circuit Court erred as a matter of law, however, he realizes that the Appellate Court applied the correct law. In addition, even the lower court found that the trustee did not prove adequate "badges of fraud" to succeed on his claims. Consequently, again, the trustee attempts to label conclusions of law as findings of fact to try to obtain unnecessary review by this Court.

e) The trustee asserts that the Appellate Court failed to give sufficient weight to the "behavior of ownership" demonstrated by Hal. Again, it is the trustee who fails to acknowledge the applicable law. The Taylors are married. Hal transferred the property when he was solvent. He proved that the reason for the transfer was estate planning and that facts existed to support this intent. The Tenth Circuit did not "grossly underweigh" this "badge of ownership"; the Appellate Court applied the correct law to the facts and reversed the holding of the lower court.

V. THE TENTH CIRCUIT CORRECTLY HELD THAT THE IMPOSITION OF THE TRUSTS BY THE BANKRUPTCY COURT WAS IMPROPER, AND THUS, HAL HAD NO EQUITABLE INTEREST IN THE PROPERTY

The trustee appears to assert that the Tenth Circuit was wrong when it focussed on whether the Bankruptcy Court correctly imposed a trust against Judy's property. The trustee seems to forget legal principles. He argues that the Appellate Court should have found that Hal had an equitable interest and, then, the trusts could have been imposed. The legal system does not work this way. First, a claimant must plead and prove his cause of action.

Second, a remedy may be awarded. Third, the Appellate Court will decide whether the lower court found the right legal solution. In this case, the lower court granted the trustee the interest in Judy's property based upon its imposition of the trusts. Clearly, a court cannot simply declare that a party has an equitable interest in property without the movant proving a claim that gives him an equitable interest.

IV. THE TENTH CIRCUIT DID NOT MISAPPREHEND THE POLICY AT STAKE IN THIS CASE

The trustee argues that the policy herein is to preclude "the avoidance of creditors through the manipulation of legal title". Brief, p. 18. Thus, he asserts, it is wrong for the Appellate Court to let Hal continue to live in the property. First, the Bankruptcy Court held that Hal did not transfer the property with intent to hinder, delay, or defraud creditors; in fact, the Court found that there were no creditors at the time of the transfer. This is not a case where the conveyance was wrongful, fraudulent, or otherwise voidable. The Tenth Circuit did not misapprehend the policy, it simply disagreed with the lower court and the trustee in the assertion that any transfer between spouses is voidable.

The reliance on the case of Leach v. Anderson, 535 P.2d 1241 (Utah 1975), is misplaced. In Leach, a trust was set up for the sole benefit of the trustor during her lifetime. That is not the present case. The transfer by Hal was for the sole benefit of Judy and Cody and was done for estate planning. Hal continued to live with his family; it obviously is not a prerequisite to the use of a home that a party own the

property. The trustee is the party who misapprehends the policy in this matter. A husband and wife are entitled to decide ownership of their property. If a conveyance does not fit within the confines of a legal cause of action offering the remedy requested by the trustee, he is not entitled to set it aside.

VII. THE COURT OF APPEALS DID NOT DENY THE TRUSTEE DUE PROCESS

Unfortunately, due process, which is a very important right held by the American citizenry, is both misused and overused by losing parties in a legal action. That is the case we have here. The trustee asserts that he was denied due process because several issues were raised for the first time in the Appellate Opinion. Nothing is further from the truth. The response for each issue raised by the trustee follows:

a) The determination of an equitable property interest is an issue of law. Originally, the issue was decided by the Bankruptcy Court as a conclusion of law. The issue was raised with the Complaint that initiated this action. The trustee's assertion that the issue was first raised by the Tenth Circuit is erroneous.

b) The trustee asserts that the Tenth Circuit raised for the first time the issue of whether the lower court was attempting to adopt a per se rule. The Tenth Circuit stated that it appeared that this was what the lower court did. It was just a comment and part of the Court's analysis. The Tenth Circuit did not violate due process.

c) The issue of whether the finding of an equitable property interest of a debtor would prevent transfer of title to the home between spouses for tax and estate planning purposes has been in this case since the trial. Hal testified that this was his purpose for transferring the property. Further, the specific issue was raised in the Motion for Emergency Stay filed by Judy with the Tenth Circuit and to which the trustee filed a response.

d) The issue regarding financial institutions requiring both spouse's signatures has been addressed previously, and expressly was presented in Judy's Brief to the Tenth Circuit at page 11. No violation of due process occurred.

e) The issue of the transcript is perplexing. This has been addressed above. The Appellate Court did not violate due process. There was no change in any of the accepted facts. The questions before the Appellate Court all concerned issues of law.

The trustee should have been acquainted with these issues before the Tenth Circuit published its opinion. The trustee was not denied due process, he had notice and opportunity to be heard on each issue.

VIII. THE COURT OF APPEALS DID NOT VIOLATE FUNDAMENTAL RULES OF APPELLATE REVIEW

The argument that the Court of Appeals violated fundamental rules of appellate review is premised on the false assumption that the Court of Appeals set aside the Bankruptcy Court's findings of fact. It did not. The Appellate Court reversed the lower

court's Conclusions of Law as pertaining to the claimed equitable property interest of Hal. Consequently, the transcript was not necessary. See Estate of Cusick v. Englesath, 842 P.2d 934 (Utah 1992); Prudential Capital Group Co. v. Mattson v. Key Airline, 802 P.2d 104 (Utah 1990).

CONCLUSION

The Tenth Circuit Court of Appeals held that the Bankruptcy Court erred in its application of law and in reaching its conclusions of law. The Appellate Court did not reverse any finding of fact made by the lower court. The trustee was not denied due process. He had notice and opportunity to defend each and every issue presented in this case. The trustee cannot be allowed to manipulate the record by asserting, for the first time, that the determination of equitable property interests is a question of fact rather than a question of law. The trustee is wrong.

The Tenth Circuit correctly applied the law to determine that Judy, a married woman, is entitled to own her own property, even if it was given to her by her husband during their marriage. She does not need to get divorced from that husband, or to reside separately, to own property. The trustee failed to demonstrate that the transfer could be set aside. The trustee failed to demonstrate that Hal intended, at the time of the conveyance, to continue to own the property even though he had transferred it to Judy. The trustee failed to show that Judy would be unjustly enriched by retention of her own property. It is the trustee who is attempting to violate this right given to women in the State of Utah decades ago.

Article XXII, § 2, Utah Constitution, expressly provides that

> Real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Judy can own her property and this property is not subject to the claims of Hal's creditors. The Tenth Circuit Court of Appeals was correct in its determination.

There is no basis upon which this Court should review this case and the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 19th day of August, 1998.

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